

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner
Marshall Johnson
Ken Nickolai
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Commission Investigation
into the FCC Triennial Review Order's
National Presumptive Finding of No
Impairment for Local Switching on High
Capacity Loops Available to Business
Customers

ISSUE DATE: February 10, 2004

DOCKET NO. P-999/CI-03-960

ORDER ACCEPTING AND ADOPTING
ADMINISTRATIVE LAW JUDGE'S
REPORT AND LAUNCHING INQUIRY

PROCEDURAL HISTORY

I. The FCC's Order

On February 20, 2003, the Federal Communications Commission (FCC) adopted its Triennial Review Order,¹ which revised the federal rules governing the obligations of incumbent local exchange carriers to unbundle certain elements of their networks and make them available to competitive carriers at cost-based rates.² On August 21, 2003, the FCC released the text of that Order. The effective date of the Order and the new rules was October 2, 2003.

One of the major revisions the Order made to the federal unbundling rules was to eliminate the across-the-board requirement to unbundle local circuit switching. Instead, the Order adopted separate unbundling requirements for mass market customers (residential and very small business customers) and enterprise customers (medium and large business customers served by loops of DS1 capacity or higher), based on the degree to which lack of access to unbundled switching would impair the ability of competitive carriers to serve these customer classes.

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Released August 21, 2003.

² 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 CFR 51.307 *et seq.*

The FCC found significant impairment in the case of mass market customers and no impairment in the case of enterprise customers. The agency therefore continued to require unbundled switching when competitive carriers served mass market customers and stopped requiring it when competitive carriers served enterprise customers.

The FCC recognized, however, that impairment in serving enterprise customers might still exist in specific geographic markets. The FCC therefore gave states an opportunity to rebut the no-impairment finding as to specific geographic markets by filing a petition with the agency within 90 days of the effective date of the Order.

II. Proceedings Before this Commission

On September 30, 2003, this Commission issued a Notice and Order for Hearing, referring for evidentiary development the claims of two competitive local exchange carriers – US Link, Inc. and Desktop Media d/b/a DM Broadband (Desktop Media) – that there were specific markets within this state in which competitive local exchange carriers were impaired in their ability to serve enterprise customers without access to local circuit switching as an unbundled network element.

On October 27, 2003, at the urging of the Department of Commerce, US Link, Inc., and Desktop Media, the Commission issued an Order extending the due date for the report of the Administrative Law Judge from December 15, 2003 to January 15, 2004, beyond the FCC's December 31 deadline for petitions to rebut the new federal presumption of no impairment. The moving parties stated that they could not assemble the evidence required to rebut the presumption within the established time frame and that they would rather risk an FCC refusal to extend the deadline than to devote their energies and resources to developing an evidentiary record they knew would be deficient.

On November 17, 2003, US Link, Inc. informed the Administrative Law Judge and the Commission that it did not intend to file testimony or participate further in the case.

On January 15, 2004, the Administrative Law Judge filed her Findings of Fact, Conclusions of Law, and Recommendation. She found that there was insufficient evidence in the record to support a conclusion that competitive local exchange carriers were impaired in their ability to serve enterprise customers without access to unbundled local circuit switching in the three markets at issue – the Duluth, Rochester, and St. Cloud LATAs.³ She recommended that the Commission conclude that there was insufficient evidence to rebut the FCC's presumptive finding of no impairment.

³ LATA is an acronym for "local access and transport area." LATAs were established at the time of the court-ordered divestiture of AT&T's local service operations and mark the geographic areas within which Bell Operating Companies may provide local exchange and exchange access services.

On January 21, 2004, the Department of Commerce and Desktop Media filed exceptions to the Administrative Law Judge's Report. On January 29, 2004, the case came before the Commission, the parties presented oral argument, and the record closed under Minn. Stat. § 14.61, subd. 2.

FINDINGS AND CONCLUSIONS

III. Administrative Law Judge's Report Accepted and Adopted

The Commission has reviewed the record, examined the Report of the Administrative Law Judge, and heard the arguments of all parties.

The Administrative Law Judge's Report is comprehensive, thoughtful, and thorough. It sets forth the law – the standards set by the FCC in the Triennial Review Order – in detail. It painstakingly reviews the arguments and the evidence of all parties. It weighs the evidence in light of the burden of proof and persuasion the Commission would face in any FCC proceeding to rebut the presumptive finding of no impairment in the three markets at issue. It concludes that the Commission could not meet that burden.

The Commission reaches the same conclusion for the same reasons. The record does not support a finding that competitive local exchange carriers would be impaired – as that term is defined by the FCC – in serving enterprise customers in the Duluth, Rochester, and St. Cloud LATAs without access to unbundled local circuit switching. The record does not contain the evidence necessary to support a petition to rebut the FCC's presumptive finding of no impairment as to enterprise customers in these markets.

The Commission therefore accepts, adopts, and incorporates by reference the Report of the Administrative Law Judge.

IV. Follow-up Inquiry Launched

Finally, the Commission's statutory responsibility to encourage the development of full and fair competition⁴ requires that it follow-up on today's action by monitoring the competitive impact of ending the availability of local circuit switching as an unbundled network element for enterprise customers. Eliminating this unbundled network element will have an immediate effect on competition, since competitive carriers in the three markets at issue serve a significant portion of their enterprise customers using unbundled local circuit switching.

Presumably, any adverse effects on competition will be short-term and will be more than offset by the long-term benefits of significant increases in sustainable, facilities-based competition. As the competitive landscape changes, however, it is critical for the Commission to remain informed, engaged, and ready to use the regulatory tools at its disposal to fulfill its statutory mission to promote competition.

⁴ Minn. Stat. §§ 237.011; 237.16.

The Commission will therefore launch a follow-up inquiry to monitor the competitive impact of ending the availability of unbundled local switching for enterprise customers. The Commission will delegate implementation details to the Executive Secretary, asking that the matter be placed on the agenda again by the end of May. At that point the Commission will review the immediate impact of eliminating the unbundled network element and will set the future course of this inquiry.

The Commission will so order.

ORDER

1. The Commission hereby finds that there is insufficient evidence in the record of this proceeding to support a conclusion that competitive local exchange carriers are impaired in their ability to serve enterprise customers without access to unbundled local circuit switching in the markets at issue.
2. The Commission hereby accepts, adopts, and incorporates by reference the Findings of Fact, Conclusions of Law, and Recommendation of the Administrative Law Judge.
3. The Commission hereby opens an inquiry into the competitive impact of ending the availability of local circuit switching as an unbundled network element for enterprise customers.
4. The Commission hereby delegates to the Executive Secretary the authority to solicit comments, set deadlines, and otherwise manage and coordinate the inquiry launched above.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice) or 1-800-627-3529 (TTY relay service).